TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 788. 348 77.

THE UNITED STATES, APPELLANT,

vs.

FRANK B. CROSTHWAITE.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 31, 1895.

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1 In the Court of Claims.

FRANK B. CROSTHWAITE
vs.
THE UNITED STATES. } No. 18389.

I.—*Petition.—Filed May 3, 1894.*

Your petitioner, Frank B. Crosthwaite, respectfully shows to the court—

1. That he is a citizen of the United States, residing in the city of Washington, in the District of Columbia, and has always yielded true allegiance to the United States.

2. That on the 1st day of March, 1889, he was appointed a special examiner in the Department of Justice, at an annual salary of $2,500.00, which position he held until the 30th day of June, 1893, and that he drew the salary of said office for said period.

3. That on the 13th day of August, 1892, he was duly appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term at Coeur d'Alene, Idaho, for August 23, 1892. A copy of his said ap-
2 pointment is filed herewith and made part hereof, marked Exhibit A.

4. That he duly qualified in, entered upon, and discharged the duties of said office, and assisted the Hon. Freemont Wood, U. S. attorney for said district, at Coeur d'Alene, at said term of the United States court, in the preparation and prosecution of all criminal business which came before that court at said term.

5. That his just and reasonable compensation for his services rendered in that behalf is one thousand dollars; which sum is due to him and remains wholly unpaid; and the petitioner says that he is sole owner of said claim, never having assigned the same or any part thereof to any person or persons.

Wherefore the petitioner demands judgment against the defendant for one thousand dollars, and all proper relief in the premises.

(Signed) FRANK B. CROSTHWAITE,
Petitioner.

(Signed) CHANEY & RANNELLS,
His Attorneys.

DISTRICT OF COLUMBIA,
County and City of Washington, ss:

Before me, William J. Rannells, a notary public in and for said District, appeared Frank B. Crosthwaite, who, being duly sworn, upon his oath, says, that the material allegations set out in the foregoing petition are true in substance and in fact.

(Signed) FRANK B. CROSTHWAITE,
Petitioner.

Subscribed and sworn to before me this 2nd day of May, 1894.

(Signed) WILLIAM J. RANNELLS,
Notary Public.

EXHIBIT A.

DEPARTMENT OF JUSTICE,
Washington, D. C., August 13, 1892.

SIR: You are hereby appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene, for August 23, 1892.

Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this Department without delay.

Respectfully,
(Signed) CHARLES H. ALDRICH,
Acting Attorney-General.

FRANK B. CROSTHWAITE, Esq.
(Through Freemont Wood, U. S. attorney, Boise City, Idaho.)

3 II.—*Traverse.—Filed April 3, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law.—Filed April 22, 1895.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

During the year 1892 the claimant was an examiner in the Department of Justice duly appointed by the Attorney-General. On the 22d June, 1892, he received from the Attorney-General the following order:

"You are directed to discontinue your investigations in Utah and proceed at once to Idaho and confer with the author of the communication [referring to a confidential communication at the same time transmitted by the Attorney-General] and make a thorough examination of all matters that may be brought to your attention or that you may be able to find out in any way relating to the marshal. In addition to the above, while in Idaho you will make an examination of the offices and accounts of the United States attorney, the United States marshal, the clerk of the United

States court, and the United States commissioners. You will make the usual investigation as to the manner in which the business is conducted, inform yourself as to the character and qualifications of the various officials, and report the results of your examination to this Department."

II.

While thus engaged in Idaho the claimant received the following order by telegraph, with which he complied:

DEPARTMENT OF JUSTICE,
Washington, D. C., August 9, 1892.

F. B. CROSTHWAITE,
Examiner, Department Justice, Boise City, Idaho.
(Care U. S. Attorney.)

Report to and assist the United States attorney at a special term to be called by Judge Beaty at Coeur d'Alene City, Idaho.

ALDRICH,
Acting Attorney-General.

III.

On the 13th August, 1892, the claimant was appointed special assistant to the attorney of the United States for the district of Idaho. The appointment was in the following terms:

DEPARTMENT OF JUSTICE,
Washington, D. C., August 13, 1892.

FRANK B. CROSTHWAITE, Esq.,
Boise City, Idaho.
(Through Fremont Wood, U. S. Attorney.)

SIR: You are hereby appointed a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene for August 3rd, 1892.

Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this Department without delay.

Respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General.

IV.

The claimant took the oath of office as prescribed by the appointment and performed the duties assigned to him thereunder. He appeared on behalf of the United States before the U. S. commissioner at Wallace, Idaho, for the purpose of having him discharge a large number of the rioters who had been held to appear for examination, and he examined a large number of witnesses before the grand jury, and he rendered daily attendance and assistance at the trial of the cases, and generally rendered the

professional assistance of an assistant district attorney from the 23d August, 1892, to the 28th September, 1892. He also performed and discharged his duties of examiner.

V.

At the time of rendering the service above described as special assistant district attorney, the claimant was receiving from the United States as examiner in the Department of Justice a salary of $2,500 per annum. He was also reimbursed for his traveling expenses during the period he acted as assistant district attorney.

VI.

On the 14th August, 1892, while at Boise City, Idaho, and after his appointment as special assistant district attorney had been made, but before it had been received by him, the claimant mailed to the Attorney-General an official letter in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said:

"I will proceed to Wallace to-morrow for the purpose of preparing the cases for trial, and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly.

"In order that no question may be raised by the defense as to my status, and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as a special assistant to the United States attorney, without compensation, for these cases."

VII.

The court finds that the value of the claimant's services as special assistant district attorney for the period from the 23d August to the 28th September, 1892, was $300.

VIII.

Before suit brought, the Attorney-General refused to fix the compensation of the claimant for his services as assistant district attorney hereinbefore set forth, and has refused to allow him any compensation whatever.

6 The claimant's application for compensation and the refusal of the Attorney-General are in the words following:

COEUR D'ALENE, IDAHO, *Sept. 29th, 1892.*

The ATTORNEY-GENERAL,
Washington, D. C.

SIR: I have the honor to hand to you herewith a statement of services rendered as special assistant United States atty. for the district of Idaho.

I send this statement to you, considering that it is necessary, if it shall be determined that I shall be compensated for the services performed as asst. U. S. atty. I have left the amount to be inserted at the Department in accordance with your action thereon.

Very respectfully,

FRANK B. CROSTHWAITE.

The United States to Frank B. Crosthwaite, Dr.

To services as special assistant United States attorney for the district of Idaho, for and during the special term of the United States district court held at Coeur d'Alene City from August 23d to September 28th, inclusive, 1892, 37 days, at per diem.

Appointment dated Aug. 13th, 1892.

I hereby certify that I have performed the services charged for and that I have received no pay for the same.

F. B. CROSTHWAITE.

I certify that F. B. Crosthwaite has performed the service on the days specified in the foregoing account.

JAS. H. BEATTY,
Judge U. S. Dist. Court, Dist. of Idaho.

COEUR D'ALENE, IDAHO, *Sept. 29th, 1892.*

4948—1892.] DEPARTMENT OF JUSTICE,
Washington, D. C., October 7, 1892.

F. B. CROSTHWAITE,
Examiner, Department of Justice, Cheyenne, Wyoming.

SIR: Yours of the 29th ultimo relating to your request to be allowed compensation for services as special assistant United States attorney in the Idaho cases is received, together with your account for the same. Also letters from Judge Beatty and United States Attorney Wood concerning it.

No such claim can or will be allowed by me. I am surprised that you should have made such a demand. You certainly did not exercise your usual sense of propriety in this matter, especially in consulting with officers whom you were sent out to examine about a claim of your own so unfounded. You were there especially for the purpose of curtailing expenses in all directions, and such a claim as you submit was, to say the least, a very poor example to others.

As an examiner of this Department you receive $2,500 a year and expenses, and what you have been doing is clearly within the line of your duty in the premises.

Very respectfully,

W. H. H. MILLER, *Attorney-General.*

CONCLUSION OF LAW.

And upon the foregoing findings of fact a majority of the court decides as a conclusion of law—

The claimant should recover the value of his services as assistant district attorney, to wit, $300.

7 IV.—*Claimant's motion to amend finding No. 7 and order overruling same.*

Comes now the complainant by his attorneys herein and moves the court to add to finding No. 7, as handed down by the court in said case April 22, 1895, the following:

The court further finds that if the estimate of the value of the claimant's services herein as fixed by the claimant's witnesses be accepted, that

the claimant's services herein should be reasonably worth one thousand dollars (1,000).

Respectfully submitted.

JOHN C. CHANEY.

Filed May 10, 1895.

Overruled by the court May 13, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

8 V.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

The Government, as defendants in this case, can not say that when they commissioned the claimant and sent him into the grand jury room at Coeur d'Alene he was an assistant district attorney, and that when he came to them for compensation he was not an assistant district attorney. If he was not then an assistant district attorney he had no right to go into the grand jury room and assist in the finding of indictments, and the Government had no right to send him. If he was an assistant district attorney, the service which he rendered in the grand jury room was service as such, and the question in the case is whether he is precluded from recovering compensation by reason of his holding another office and receiving the salary attached to it by law.

It is contended by the counsel for the defendants that the services of the claimant as special examiner in the Department of Justice and as assistant district attorney were not "distinct and different."

The statute authorizing and defining the duties of special examiners is as follows:

"For the detection and prosecution of crimes against the United States, preliminary to indictment; for the investigations of official acts, records, and accounts of officers of courts, including the investigation of the accounts of marshals, attorneys, clerks of the United States courts, and the United States commissioners, under the direction of the Attorney-General, and for this purpose all the records and dockets of these officers, without exception, shall be examined by his agents at any time, thirty-five thousand dollars." (Sundry civil appropriation act, August 5, 1892.)

The statute authorizing the employment of assistant district attorneys is as follows:

"The Attorney-General shall, whenever in his opinion the public interests requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings. (Sec. 363, R. S. U. S.)

"Every attorney or counsellor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law." (Sec. 366, R. S. U. S.)

Upon the face of these statutes the duties do appear to be distinct and different. It appears that the claimant had been sent to the West to assist in working up the cases in which he afterwards took part as assistant district attorney. But conceding this, it does not follow that the services were not distinct and different. A surgeon may be employed at an annual salary to edit a medical journal. During his period of service his employer may employ him to perform a surgical operation. Both the editing of the journal and the performance of the operation will require a knowledge of surgery; yet no one would contend that the two are not distinct and different. So the hunting up of witnesses, the examining of accounts, and other work of an examiner differ from the professional work of going into a grand jury room and examining 175 witnesses. The latter duty involves responsibility, preparation, professional skill, and nervous strain distinct and different from those of a lawyer's clerk or a detective or a special examiner.

It has been regarded as settled since the decision of the Supreme Court in United States v. Saunders (120 U. S. R., 126) that a person may hold two offices and receive the salaries of both, notwithstanding the provisions of the Revised Statutes, secs. 1763, 1764, 1765, provided that they
9 are distinct, each having its own duties and compensation, and are not incompatible. In this case we have seen that the offices are distinct and that each has its own duties and compensations. The resulting question is whether they are incompatible.

Two offices are incompatible when a performance of the duties of the one will prevent or conflict with a performance of the duties of the other, as in Webster's Case (28 C. Cls. R., 25), where the offices were those of engineer in the Navy and paymaster; and as in Winchell's Case (ib., 30), where the offices were that of engineer in the Navy and that of draftsman in the Hydrographic Office; or when the holding of the two offices is contrary to the policy of the law, as in Badeau v. The United States (130 U. S. R., 439), where the one office was that of a retired army officer and the other one in the consular service. In this case the duties were not incompatible. Both required the claimant to be at the same place; and it appears that the performance did not interfere with or relieve him from the performance of the other.

In this case, as in Bentley's (26 Cls. R. C., 241), there may be a question whether the claimant can recover until the Attorney-General has fixed the amount of his compensation. That point was raised, but was not decided, the case going off for other reasons. Here the claimant was ordered by telegram to proceed to a certain place. He did so, and there found an appointment from the Attorney-General as special assistant to the attorney of the United States for the district of Idaho to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene for August 23, 1892. The appointment also said, "Your compensation will be determined by the Attorney-General upon completion of your service. Execute the customary oath of office and forward the same to this Department without delay." The claimant complied with these instructions; he took the oath of office and assisted in the preparation and prosecution of the criminal business referred to. It is true that before he had accepted the office he had suggested the advisability of his appointment "as a special assistant to the United States attorney, without compensation, for these

cases." But that letter was not written until after this special appointment of the Attorney-General had been made. It was a proposition not acted upon by either party, and is properly in the case only as it may affect the question of damages.

Another peculiar fact in this case is that the appointment was made by one Attorney-General (Acting Attorney-General Aldrich), and the refusal to allow the claimant compensation came from another (Attorney-General Miller). If the Attorney-General had allowed the claimant some compensation, though small and inadequate, it may be that it would preclude him from seeking more. By accepting the appointment he may be said to have agreed to submit the question of compensation exclusively to the Attorney-General. But he did not agree by accepting the appointment to submit to the arbitrament of the Attorney-General the question whether he was in law entitled or not entitled to any compensation whatever. Does the refusal of the Attorney-General to fix the value of his service and the amount of his compensation leave the claimant free to recover in quantum meruit? In Cooper's Case (8 C. Cls. R., 199) it was held that where a contract provides that a contractor shall be allowed and paid a
10 reasonable price, to be estimated and determined by a board of inspectors appointed by the Quartermaster's Department, and the department neglects to appoint such board, the contractor may bring his action and recover for his work. This case has been frequently recognized since, and rarely, if ever, questioned. It seems clear that if a person is legally entitled to compensation the refusal of a public officer to fix the amount of the compensation should not deprive him of his rights.

In this case, as in Bentley's, the claimant has sought to prove by the depositions of lawyers the value of the services rendered. As in Bentley's Case, we regard their statements as little more than the opinion of witnesses. Furthermore, the opinions are not based upon the actual relations of the parties. Here the preparation of the claimant as counsel was largely acquired by his services as examiner. The value of his services as examiner must be gauged by the salary which he received and accepted, $2,500. His traveling expenses and hotel bills were paid by the United States.

As was said in Bentley's Case, the value of a lawyer's services is a matter of opinion, as to which the court will not be bound by the testimony of witnesses. Basing our conclusion upon all of the facts of the case, the value of the claimant's services as examiner, the relations of the parties, the fact that the claimant offered to perform without compensation, and the nature of the services rendered, we place the compensation at $300.

Three of the four members of the court who sat in the case concur in this opinion.

11 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 22d day of April, 1895, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, Frank B. Crosthwaite, do have and recover of and from the United States the sum of three hundred dollars ($300).

By the Court.

12 VII.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 22d day of April, 1895, in favor of the claimant, the defendants, by their Attorney-General, on the 18th day of June, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed June 18th, 1895.

Allowed in open court October 29, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

13 In the Court of Claims.

FRANK B. CROSTHWAITE }
vs. } No. 18389.
THE UNITED STATES. }

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 30th day of October, 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16078. Court of Claims. Term No., 788. The United States, appellant, vs. Frank B. Crosthwaite. Filed October 31st, 1895.

No. 77.

Brief of Atty. Gen.l (Pratt) for Appt

Filed Oct. 19, 1897.

OCT 19 1897
JAMES H. McKENNEY,

In the Supreme Court of the United States

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
FRANK B. CROSTHWAITE, APPELLEE. } No. 77.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
FRANK B. CROSTHWAITE, APPELLEE. } No. 77.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

This is an appeal by the United States from a judgment rendered against them by the Court of Claims.

The facts as found by that court are briefly as follows:

During the year 1892 appellee was an examiner in the Department of Justice, at a salary of $2,500 per annum, and had been sent to the State of Idaho to perform certain duties, more fully set out in Finding I. While thus engaged, to wit, on August 9, 1892, he was ordered to

report to and assist the United States attorney at a special term of the United States court, at Cœur d'Alene City, Idaho. On August 13, 1892, appellee was appointed a special assistant to the United States attorney for the district of Idaho, one of the clauses of his commission reading as follows:

> Your compensation will be determined by the Attorney-General upon the completion of your service.

On August 14, 1892, but prior to his receipt of this commission, appellee mailed to the Attorney-General an official letter in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said:

> I will proceed to Wallace to-morrow for the purpose of preparing the cases for trial and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly. In order that no question may be raised by the defense as to my status and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as a special assistant to the United States attorney, without compensation, for these cases.

Appellee took the oath of office as special assistant to the district attorney, appeared in these riot cases before a United States commissioner, examined witnesses before the grand jury, and rendered daily attendance and assistance at their trial, and generally performed the duties of an assistant district attorney from August 22, 1892, to

September 28, 1892. He also, during said period, performed his duties as an examiner, for which he was paid and allowed traveling expenses. On September 29, 1892, appellee filed with the Attorney-General an application for compensation for the above services as special assistant district attorney, which was disallowed by the Attorney-General upon the ground that they were services that fell within the duties of an examiner.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding that said appellee, Frank B. Crosthwaite, rendered the professional assistance of an assistant district attorney to the United States attorney for the district of Idaho from the 23d August, 1892, to the 28th September, 1892, and also performed his duties as an examiner of the Department of Justice at the same time, as set out in Finding IV.

II.

The court erred in finding that the value of appellee's services as special assistant district attorney for said period was $300, as set out in Finding V.

III.

The court erred in finding, as a conclusion of law, that said appellee should recover the value of his services as assistant district attorney, to wit, $300.

IV.

The court erred in rendering judgment in favor of said appellee and against these appellants for said sum.

ARGUMENT.

From the above statement of facts it seems clear to us that practically all of the services performed by appellee as a special assistant district attorney could have been performed by him as an examiner, and that it was his duty as an examiner to perform them when so ordered by the Attorney-General. If this is true, it is clear that he can not receive compensation for performing them both as an examiner and as a special assistant district attorney.

Section 1763, Revised Statutes, is as follows:

> No person who holds an office the salary or annual compensation to which amounts to the sum of two thousand five hundred dollars shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

This court and the Supreme Court have held in several cases, among others *Saunders's Case* (120 U. S., 126), that this section is not applicable to persons holding two offices whose duties are different and distinct and not incompatible.

In taking advantage of these decisions claimant has pursued the usual course of claimants and pointed out that the duties of the two offices are not incompatible, and ignored the further requirement that those duties must be *distinct and different*. And yet no decision of this court or the Supreme Court has been silent as to this condition.

In *Converse's Case* (21 How., 463) the Supreme Court held, in discussing this and similar statutes, that the Secretary of the Treasury could appoint a collector of customs

an agent to purchase supplies for light-houses, and could allow him commissions upon his disbursements for supplies for light-houses outside of his district, but could not allow him anything upon those purchased for use in his district, because the Secretary might have ordered him to make such purchases as collector, in which case he would not have been entitled to any extra compensation if his regular compensation amounted to as much as $2,500 per annum.

In this case it was the duty of the claimant, as an examiner, to assist the district attorney in every manner possible in the trial of these cases, and the only service which he is shown to have performed as a special assistant which he could not have performed as an examiner was going into the grand jury room. It will hardly be contended that this was worth the amount of the judgment in the court below. The other services he was by his own statement (Finding VI) in the act of performing as an examiner when he received his oppointment as a special assistant district attorney, and since he could have continued and completed them in that capacity they certainly were not duties *distinct and different* from those of an examiner.

We therefore insist that while the two offices held by appellee may not have been incompatible, their duties were not distinct and different, and could not be held by one person at the same time.

Another reason why appellee should not recover is that when such special assistant is appointed the Attorney-General must, under the provisions of section 365, Revised

Statutes, certify that the services could not have been performed by the officers of the Department of Justice or the district attorney before such special assistant can be compensated for his services. This certificate the Attorney-General indignantly refused to give (Finding VIII), and without it we insist appellee can not recover.

LOUIS A. PRADT,
Assistant Attorney-General.

No. 77.

Brief of Chaney & Garrison for Appellee.

FILED
OCT 26 1897
JAMES H. McKENNEY

Filed Oct. 26th 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,
vs.
FRANK B. CROSTHWAITE,
Appellee.
} No. 77.

BRIEF OF APPELLEE.

JOHN C. CHANEY,
JOHN R. GARRISON,
For Appellee.

MILANS, LAW PRINTER, 918 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant.
vs. No. 77.
FRANK B. CROSTHWAITE,
Appellee.

APPELLEE'S BRIEF.

This was a case in the Court of Claims in which the appellee, while an Examiner in the Department of Justice, was duly appointed a special assistant attorney to aid in the preparation and prosecution of all criminal business properly coming before the U. S. Court at Coeur de Alene, Idaho, during its special term, held at that place, beginning August 22, 1892, took his oath of office, and entered upon and discharged his duties as such special assistant attorney, in accordance with instructions, from August 22, 1892 to September 28, 1892.

The fact of his appointment is found in finding 3 of the Court of Claims, at page 3 of the record, and is as follows:

"DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *August 13, 1892.*

FRANK B. CROSTHWAITE, Esq.,
BOISE CITY, IDAHO.
(Through Fremont Wood, U. S. Attorney.)

SIR: You are hereby appointed a special assistant to

the attorney of the United States for the District of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court, during its special term, ordered at Coeur d'Alene for August 23d, 1892. Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this department without delay.

Respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General."

The Attorney-General in the appellant's brief, assigns it as error for the Court of Claims to find, as it did in Finding 4, that appellee "took the oath of office as prescribed by the appointment and performed the duties assigned to him thereunder." And also that "he also performed and discharged the duties of Examiner."

The evidence in the case, at the trial, established these facts, and, clearly the court had a right to find these facts, and committed no error therein. For these facts were of the essence of the case and should be found.

Rule 1, regulating appeals from the Court of Claims, is as follows:

"In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other."

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees, as may be necessary to a proper review of the case.

2. A finding by the Court of Claims of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them, and a

separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

If the Attorney-General means by this assignment of error, that the Court of Claims did not *accurately* find said facts, he is met with decisions of this court, in which it is held that the appellant is concluded by the findings of the Court of Claims.

In the case of Mahan *vs.* The United States, 14 Wallace, page 109, at page 112, the Supreme Court, in speaking of the four and five rules governing appeals from the Court of Claims, adopted at the December Term, 1869, say:

"The fourth requires the Court of Claims to make and file their findings of fact in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request, that, as to that points the court will make a finding. But it was never supposed that the party would ask or that the court would find the fact to be as the party claimed it, and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first."

In the Adams case, 6 Wallace, 101, at page 110, in speaking of the rule governing appeals from the Court of Claims, there is given the reason for the rule as follows:

"The rule was made for the protection of this court, as well as to secure a finding of facts, by a tribunal which must of necessity inquire into them fully, and which, having ample time, and being otherwise every way competent, may be relied on to find them truly."

The findings, therefore, have been "truly" made.

If the Attorney-General means by this assignment of error to urge the impossibility of a man holding two compatible offices at one and the same time, he is met by the decisions of the courts and the rulings of the executive departments, which say it can be so.

> Comptrollers Decisions, 5 Val., 253; Meigs *vs.* U. S., 19 C. Cls., 497; Saunders *vs.* U. S., 21 C. Cls. 408; Collier *vs.* U. S., 22 C. Cls., 125; Converse *vs.* U. S., 21 Howard, 463; United States *vs.* Brindle, 110 U. S., 688.

The facts found are, therefore, compatibly true, so that said assignment of error cannot be well founded.

The second assignment of error, that the Court of Claims should not have found $300.00, as set out in Finding 7 (not Finding 5, as the Government brief has it,) is subject to the agreement above submitted, and is not well founded for the reason given.

The third assignment of error, namely: "The court erred in finding, as a conclusion of law, that said appellee should recover the value of his services as Assistant District-Attorney, to wit, $300.00," and the fourth assignment of error, that "The court erred in rendering judgment in favor of said appellee and against said appellants for said sum," is next in order for consideration.

There is no reason for objecting to payment of this judgment. The appellee was duly appointed and qualified; he discharged the duties of his office faithfully and efficiently, and these services were worth at least, $300.00. The Court of Claims so finds.

But the Attorney-General contends that because appellee held also the position of Examiner in the Department of Justice on a salary of $2,500.00 at this time, he should not be paid for his services as Assistant Attorney:

but that is no reason why he should not be paid this $300.00.

In order that the court may have at hand all the statutes relating to the matter, we will quote the Sundry Civil Act of August 5th, 1892, which authorized the appointment of Examiners in the Department of Justice. It is as follows:

"For the detection and prosecution of crimes against the United States, preliminary to indictment; for the investigations of official acts, records, and accounts of officers of courts, including the investigation of the accounts of marshals, attorneys, clerks of the United States courts, and the United States Commissioners, under the direction of the Attorney-General, and for this purpose all the records and dockets of these officers, without exception shall be examined by his agents at any time, $35,000."

The authority for the appointment of special counsel is as follows:

Section 363, R. S. U. S.

"The Attorney-General, shall, whenever in his opinion the public interests require it, employ and retain in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

Section 366, R. S. U. S.

"Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the District Attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the District-Attorneys and

shall be subject to all the liabilities imposed upon them by law."

The compatibility of the offices was really the only question in the lower court, and is the question here, for as Justice Nott well says, in the opinion handed down by the Court of Claims in this case:

"The Government, as defendants in this case, cannot say that when they commissioned the claimant and sent him into the grand jury room at Coeur de Alene, he was an Assistant District Attorney, and that when he came to them for compensation he was not an Assistant District Attorney. If he was not an Assistant District Attorney, he had no right to go into the grand jury room and assist in the finding of the indictments, and the Government has no right to send him. If he was an Assistant District Attorney, the service which he rendered in the grand jury room was service as such."

In the commission of appointment, appellee was advised that he would be paid as Assistant District Attorney. The language is as follows:

"Your compensation will be determined by the Attorney-General upon completion of your service."

The letter in the record which appellee wrote expressing a willingness to do the work for nothing, cannot vary the employment.

Appellee took the oath according to the express directions of the Attorney-General, the words of which are as follows:

"Execute the customary oath of office and forward to this Department without delay."

He accepted the employment, and took the oath of office on the express promise that his "compensation would be determined by the Attorney-General upon the completion of his service." Service of what? Service of Assistant

District Attorney. He performed the service but has not been paid.

The office of Assistant District Attorney and that of examiner are compatible. The duties of one are unlike that of the other; and yet the performance of the duties of the one do not interfere with the performance of the duties of the other. These offices are distinct and different as the Court of Claims found.

Judge Nott in his decision says:

"In this case we have seen that the offices are *distinct* and that each has its own duties and compensations, which is equivalent to saying they are *different*."

Appellee, therefore, has the same right to recover in this case, that Saunders had in 120 U. S., 126.

In addition to authorities cited, the question of compatibility and incompatibility of offices has been discussed in the following cases:

Webster's case, 28 C. Cls., 25; Winchell's case, 28 C. Cls., 30; Bentley's case, 26 C. Cls., 241; Badeau's case, 130 U. S., 439.

It remains to see if compensation on the *quantum meruit* may be allowed.

Cooper's case, 8 C. Cls., 199, is in point; and, as Judge Nott says in his opinion, the authority has never been questioned.

The Attorney-General having failed to fix the compensation, it becomes the duty of the court to fix it.

We respectfully submit, therefore, that no error has been committed by the Court of Claims in its findings and judgment, and that the decision of that court herein should be affirmed.

JOHN C. CHANEY,
JOHN R. GARRISON,
Appellee's Attorneys.

October 25, 1897.

UNITED STATES v. CROSTHWAITE.

APPEAL FROM THE COURT OF CLAIMS.

No. 77. Submitted November 1, 1897. — Decided November 29, 1897.

Attorneys and counsellors specially employed to render legal services for the United States cannot, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by Rev. Stat. § 365; and if he fails or refuses to give such certificate, Congress alone can provide for compensation.

One who receives a commission as special assistant to a District Attorney for particular cases, or for a single term of court, or for a limited time, is not an Assistant District Attorney within the meaning of Rev. Stat. § 365, and therefore the certificate of the Attorney General prescribed therein is a prerequisite to the allowance of compensation.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Pradt for appellants.

Mr. John C. Chaney and *Mr. John R. Garrison* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a judgment against the Government in the Court of Claims for the sum of three hundred dollars, which was found to be the value of certain services rendered by the appellee, as a special assistant to the attorney of the United States for the District of Idaho, at a called term of the Circuit Court.

The facts found by the Court of Claims, and upon which the appellee's claim for compensation depends, may be thus summarized:

On the 22d of June, 1892, the appellee, an examiner in the Department of Justice, received from the Attorney General an order directing him to discontinue the investigations then being made by him in Utah, and proceed at once to Idaho for

the purpose of conferring with the author of a certain confidential communication which had been received by the Department of Justice. The order also directed him to examine the offices and accounts of the United States Attorney, the United States Marshal, the clerk of the United States court and the United States Commissioners, investigate the manner in which business was conducted by those officers, inform himself as to the character and qualifications of the various officials and report to the Department the results of his examination.

While thus engaged in Idaho the plaintiff received by telegraph, August 9, 1892, an order from the Acting Attorney General of the United States, directing him to "report to and assist the United States Attorney at a special term to be called by Judge Beatty at Cœur d'Alene City, Idaho."

On the 13th of August, 1892, he was appointed by the Acting Attorney General "a special assistant to the attorney of the United States for the District of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Cœur d'Alene for August 3d, 1892." The order of appointment stated: "Your compensation will be determined by the Attorney General upon completion of your service. Execute the customary oath of office and forward the same to this department without delay."

It should be stated that on the 14th day of August, 1892, while at Boise City, and after his above appointment had been made, but before receiving notice thereof, the appellee mailed to the Attorney General an official communication in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said: "I will proceed to Wallace tomorrow for the purpose of preparing the cases for trial, and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly. In order that no question may be raised by the defence as to my status, and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as

a special assistant to the United States Attorney, without compensation, for these cases."

The plaintiff took the required oath of office and performed the duties assigned to him. He appeared on behalf of the United States before the United States Commissioner at Wallace, Idaho, for the purpose of having him "discharge" a large number of rioters who had been held to appear before that officer, examined witnesses before the grand jury, rendered daily service at the trial of the cases "and generally rendered the professional assistance of an Assistant District Attorney from the 23d of August, 1892, to the 28th of September, 1892." He performed also his duties as Examiner of the Department of Justice.

At the time of rendering service as special assistant to the District Attorney he was receiving in his capacity as an examiner in the Department of Justice a salary of $2500 per annum. He was also reimbursed for his travelling expenses during the time he acted as special assistant to the District Attorney.

Upon the conclusion of his services as above stated, the appellee, although he had suggested that his appointment should be without compensation, sent to the Attorney General a statement of his services, as special assistant to the District Attorney, saying: "I send this statement to you, considering that it is necessary, if it shall be determined that I shall be compensated for the services performed as ass't U. S. att'y. I have left the amount to be inserted at the Department in accordance with your action thereon." But the Attorney General expressed his surprise that the appellee should claim special compensation and refused to fix any compensation for his services, saying, in a communication to the plaintiff: "As an examiner of this department you receive $2500 a year and expenses, and what you have been doing is clearly within the line of your duty in the premises."

The question as to the employment of special counsel on behalf of the United States has frequently been the subject of legislation by Congress.

By the second section of the act of August 2, 1861, entitled

"An act concerning the Attorney General and the attorneys and marshals of the several districts," 12 Stat. 285, c. 37, it was provided "that the Attorney General be, and he is hereby, empowered, whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counsellors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant counsel the amount of compensation."

This section was repealed by the act of March 3, 1869, making appropriations for the Legislative, Executive and Judicial expenses of the Government for the fiscal year ending June 30, 1870, c. 121, 15 Stat. 283, 294. But by the act of April 10, 1869, entitled "An act concerning the Attorney General," the above act of March 3, 1869, was itself repealed, so far as it repealed the second section of the act of August 2, 1861, and that section was declared to be in full force; and it was made the duty of the Attorney General to report "at the commencement of the next session of Congress, and to each succeeding session, the names of all the persons employed for the purposes aforesaid, and where and upon what business employed, with the compensation paid to each." 16 Stat. 46, c. 25.

Next came the act of June 22, 1870, establishing the Department of Justice, 16 Stat. 162, 164, c. 150, the sixteenth and seventeenth sections of which were preserved and reproduced in the following sections of the Revised Statutes:

"Sec. 363. The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

"Sec. 364. Whenever the head of a Department or Bureau gives the Attorney General due notice that the interests of the United States require the service of counsel upon the

examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney General shall provide for such service.

"SEC. 365. No compensation shall hereafter be allowed to any person, beside the respective District Attorneys and Assistant District Attorneys, for services as an attorney or counsellor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the District Attorneys.

"SEC. 366. Every attorney or counsellor who is specially retained under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney General, or to some one of the District Attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the District Attorneys, and shall be subject to all the liabilities imposed upon them by law."

The object of these statutory provisions is manifest. While giving the Attorney General full power to employ counsel for the United States to assist those upon whom regularly devolved the duty of representing the Government in the courts without special compensation, Congress intended to restrict the exercise of that power to the extent indicated in section 365. It was left to that officer to determine whether the public interests required the employment of special counsel. But that the discretion given to him might not be abused, and that unnecessary expense might be avoided, it was declared (§ 365) that, except in the cases of the respective District Attorneys and Assistant District Attorneys, no compensation should be allowed to any person, as an attorney or counsellor for the United States, unless specially authorized by law, and then *only* on the certificate of the Attorney General that such services were actually rendered, and that the same could

not have been performed by the Attorney General, or by the Solicitor General, or by the officers of the Department of Justice, or by the District Attorneys. The giving of such a certificate was thus made a condition of the right of the court to give judgment, as upon contract, against the Government for any amount whatever as compensation for legal services rendered in its behalf by counsel specially employed or retained by the Attorney General to assist those whose duty it is to represent the United States in its legal business. Attorneys and counsellors specially employed to render legal services for the United States cannot, therefore, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by section 365 of the Revised Statutes. In accepting such employment they take the risk of that officer giving such a certificate as ought to be given. If he fails or refuses to give the required certificate, Congress alone can provide for compensation. The courts cannot disregard the express command of the statute forbidding compensation to be allowed for legal services rendered by special counsel when the claim therefor is not accompanied by the prescribed certificate of the Attorney General.

This construction of the statute necessarily requires a reversal, with direction to render judgment for the United States, unless it be held that the plaintiff, while acting under his commission as "a special assistant to the attorney of the United States" during a single term of the Circuit Court of the United States for the District of Idaho and mainly for a particular class of cases, was an Assistant District Attorney within the meaning of the words in section 365, "beside the respective District Attorneys and Assistant District Attorneys;" for, in the cases of the officers last named, no formal certificate is required from the Attorney General. But we cannot so interpret the statute. The Assistant District Attorneys referred to in that section are those who are regular Assistant District Attorneys, serving the Government at fixed salaries, and employed not for special cases or particular legal business, nor for a specified term of court, but generally and regularly for all the business of the Government that may arise in the courts

of the district in which they serve. This interpretation finds support in many appropriation acts. In the Sundry Civil Appropriation Act of October 2, 1888, c. 1069, 25 Stat. 505, 545, the distinction is made between "regular Assistants to United States District Attorneys, who are appointed by the Attorney General at a fixed annual compensation," and "assistants to United States District Attorneys in special cases." This distinction has been made in subsequent appropriation and deficiency acts. 25 Stat.; October 19, 1888, c. 1210, pp. 565, 585; March 2, 1889, c. 411, pp. 939, 977: 26 Stat.; August 30, 1890, c. 837, pp. 371, 409; September 30, 1890, c. 1126, pp. 504, 528, 548; March 3, 1891, c. 540, pp. 862, 892; March 3, 1891, c. 542, pp. 948, 986: 27 Stat.; July 28, 1892, c. 311, pp. 282, 311; August 5, 1892, c. 380, pp. 349, 386; March 3, 1893, c. 208, pp. 572, 609; March 3, 1893, c. 210, pp. 646, 661, 668: 28 Stat.; April 21, 1894, c. 61, pp. 58, 61; August 18, 1894, c. 301, pp. 372, 416; March 2, 1895, c. 189, pp. 910, 957: 29 Stat.; c. 33, pp. 17, 26; June 8, 1896, c. 373, pp. 267, 297, 310, 313; June 11, 1896, c. 420, pp. 413, 450.

We are of opinion that the better construction of section 365 is that one who receives a commission as special assistant to the District Attorney for particular cases, or for a single term of the court, or for a limited time, is not an Assistant District Attorney within the meaning of that section; and therefore the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation. Any other construction of the statute would defeat the object of its passage, which was to protect the Treasury from the expense incident to the employment of special counsel, where the Government did not have the assurance of the head of the Department of Justice, in the form of a certificate, that the services to be rendered were actually rendered and could not be performed, either by himself or by the Solicitor General, or by some officer of that Department, or by the proper District Attorney. In this view it was error to have rendered judgment against the Government.

Reversed, with directions to dismiss the action.